

Before the
UNITED STATES
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

DETERMINATION OF RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(PHONORECORDS III)

Docket No. 16–CRB–0003–PR (2018–2022)
(Remand)

**COPYRIGHT OWNERS’ SUPPLEMENTAL SUBMISSION IDENTIFYING
ADDITIONAL DESIGNATIONS OF THE REMAND DEPOSITION
TRANSCRIPTS OF PROFESSORS KATZ AND MARX**

National Music Publishers’ Association and Nashville Songwriters Association International (together, “Copyright Owners”) file this supplemental submission pursuant to the Judges’ Order Granting in Part and Denying in Part Copyright Owners’ Motion to Strike Exhibits Attached to Services’ Joint Remand Rebuttal Brief dated November 16, 2021 (eCRB Docket No. 25933 (the “Order”)), which provided that, “Copyright Owners may file a supplemental submission, within 15 (fifteen) days of the date of this Order, identifying any additional provisions in the deposition transcripts of Professors Katz or Marx that they believe should also be part of the record in order to provide for a fair contextual understanding of the deposition transcript excerpts identified in ¶ 2 above. In this supplemental filing, Copyright Owners shall link their proposed supplemental deposition transcript excerpts to the specific citations or excerpts the Judges have allowed into the record by this Order.” (Order at 14)

Copyright Owners herein identify such additional excerpts from the remand deposition transcripts of Professors Marx (“Marx Deposition Transcript”) and Katz (“Katz Deposition

Transcript”), as set forth below together with a description identifying the link between each additional excerpt and the specific excerpts that the Judges have allowed into the record. Copies of the pages from the respective deposition transcripts that contain the additional excerpts are annexed hereto as Exhibit A.

I. Page 40 Citation to the Marx Deposition Transcript (see Order at 16, ¶ 2(a)(i))

A. Excerpt allowed into the record

Page 40 of the Services’ Reply Brief cites to page 149:2-17 of the Marx Deposition Transcript. The excerpt in full reads:

Q: So you haven’t seen anything that points to sound recording rates changing in response to a change in the available surplus in that bargain. Correct?

A: [REDACTED]

The Services’ citation to this excerpt at page 40 of their Reply Brief is in reference to the last sentence of this excerpt, to which the Services added italicized emphasis: “[REDACTED]” The excerpt is cited to the passage on page 40 that argues that, “[REDACTED]” However, in the Order, what the Judges found to be proper rebuttal evidence was the other portion of the excerpted passage, which the Judges described as a “challenge” to the “alleged existence of a change in the surplus that could affect the sound recording rates.” Order at 9. Since the Order appears to admit

both portions of the excerpt, Copyright Owners counter-designate testimony linked to both passages.

B. Additional excerpts concerning Prof. Marx’s awareness of evidence of a see-saw effect

Citation	Link to excerpt allowed into the record
105:23-106:9 108:17-110:2 113:9-14	<p>In these excerpts, Prof. Marx confirms that:</p> <ul style="list-style-type: none"> • She knew that [REDACTED] [REDACTED] [REDACTED]. (108:17-110:2) • She did not know whether or not Spotify’s musical works payments went up or down from 2017 to 2020. (105:23-106:9) • She did not review documents concerning musical works royalties paid by other services beyond reading other remand statements. (113:9-14) <p>These excerpts belie the emptiness of Prof. Marx’s statement in the allowed excerpt that she “hasn’t seen” evidence of anything other than a zero see-saw. In truth, Prof. Marx had not analyzed the central evidence <i>at all</i>, and did not even undertake the most basic analysis concerning changes in royalty rates <i>before and after</i> the period during which the <i>Phonorecords III</i> rates and terms were implemented.</p>

C. Additional excerpts concerning available surplus and profitability

Citation	Link to excerpt allowed into the record
33:23-36:3	<p>In this excerpt, Prof. Marx confirms that:</p> <ul style="list-style-type: none"> • She reviewed <i>no</i> documents concerning the profitability of the services in relation to her remand report. (33:23-34:4) • She does not have “any idea” whether or not Spotify’s share value has gone up over the last five years (34:7-35:8) • Her [REDACTED] [REDACTED] • Whether or not current accounting profits or discounted future cash flow is a better metric of how a company is doing “is going to depend on the purpose that you want to use it for.” (35:16-22)

	<p>These excerpts underscore that Prof. Marx’s casual reference to Spotify “[REDACTED]” was not just ungrounded in empirical analysis, but reflected a remarkable lack of knowledge concerning the actual financial position of her client Spotify. Further, even putting aside Spotify’s actual current accounting profitability, this excerpt highlights the dubious choice that Prof. Marx made to frame profitability by reference to current accounting profits at all, especially in light of her testimony at the hearing that [REDACTED]. (Hearing Tr. 5610:16-5611:25)</p>
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II. Page 51 Citation to the Marx Deposition Transcript (see Order at 16, ¶ 2(a)(ii))

A. Excerpt allowed into the record

Page 51 of the Services’ Reply Brief cites to pages 21:17-22:9 of the Marx Deposition Transcript. The excerpt in full reads:

Q: So in your opinion, it is appropriate to have a TCC rate without a cap in connection with free or ad-supported offerings. Correct?

A. [REDACTED]

B. Additional excerpts counter-designated

Counter-designation	Link to excerpt allowed into the record
20:22-21:14 30:10-30:22	These excerpts contain the immediately preceding question and answer to the excerpt allowed into the record, as well as a later discussion. In these excerpts, Prof. Marx is asked about bundled subscription offerings, which also had an “uncapped” TCC prong under the <i>Phonorecords II</i> rates, but for which subscribers are easily defined. Her response was that she “didn’t focus on the bundled offerings,” and did not offer any reasoning for how the Services’ own proposal of an “uncapped” TCC prong for bundled subscription offerings could be consistent with their argument that such a rate

	<p>structure was inherently unreasonable for other subscription offerings.</p> <p>The Services placed their citation to the allowed excerpt after a sentence that vaguely referenced “certain products, like ad-supported services and bundles,” and cited no other evidence for that proposition beyond the allowed excerpt. But as this excerpt makes clear, the allowed excerpt does not support the Services’ empty attempt to distinguish their own proposed rate structure for bundled subscription offerings.</p>
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III. Pages 40-41 Citation to the Katz Deposition Transcript (see Order at 16, ¶ 2(b))

A. Excerpt allowed into the record

Pages 40-41 of the Services’ Reply Brief cites to pages 161:5-162:8 of the Katz Deposition Transcript. The excerpt in full reads:

Q. And on some level the whole analysis of how big the seesaw is distills down to a question of the value of mu, correct?

A. [REDACTED]

Q. How so?

A. [REDACTED]

B. Additional excerpts counter-designated

Citation	Link to excerpt allowed into the record
159:24-160:16 162:9-162:21	These excerpts contain the immediately preceding and subsequent questions and answers to the excerpt allowed into the record. The immediately preceding question concerns the statement in Katz’s WDT that, “[REDACTED]” The subsequent question clarifies that the question allowed into the record related to how the bargaining model works (which was of course the case, since the question pertained to μ (“mu”), which is a Nash bargaining model variable). In response to this question, Dr. Katz agrees that, in fact, “[REDACTED]” As these questions and answers make clear, Prof. Katz’s testimony as a whole reflects not just an acceptance of the expected effect of a change in musical works rates on sound recording rates, but an understanding as to how that effect is expected to play out that is in agreement with Prof. Watt’s analysis. This stands in stark contrast to the argument for which the Services cite the allowed excerpt in their reply brief.
141:18-143:2	This excerpt is the other Katz Deposition Transcript excerpt allowed into the record by the Judges in the Order. In this excerpt, Prof. Katz was asked if “in the real world” – <i>not just in the model</i> – he would expect to see a see-saw effect. His answer is that he <i>would</i> “[REDACTED]” Thus, while in this excerpt he contends that the dynamic explained in Prof. Watt’s Nash bargaining model might be <i>delayed</i> , he acknowledges his expectation that the dynamic is both predicted by the model and is something that he would expect to see in the real world. This directly contradicts the argument that the Services attempt to make using the allowed excerpt. On the contrary, this excerpt shows Prof. Katz’s acceptance of the “standard models,” and his thinking that an effect may not have materialized because of contract timing or the appellate remand, “[REDACTED]”
121:4-141:17	This excerpt contains the extensive discussion by Prof. Katz of the Nash bargaining model that he put forward in his rebuttal testimony at the original hearing, in which he explained his opinion, based upon his Nash modeling, that the sound recording rate would change in response to an artificial change in the musical work rate. Prof. Katz explains in detail aspects of his affirmative Nash model, which was submitted before he saw Prof. Watt’s Nash model (which was submitted at the same time, in the rebuttal submissions for the original hearing), <i>and which contains the precise economic teaching that the Services now cast Prof. Katz as rejecting, including, in Prof. Katz’s own words:</i>

	<ul style="list-style-type: none"> • “[REDACTED]” (122:4-9) • The relevance of “[REDACTED],” which he explains as the hypothetical situation of what is predicted if one factor is changed, which is “[REDACTED].” (123:16-124:9) • His explanation of how, if there is a see-saw effect <i>and also a change in another variable</i>, the <i>net</i> change in sound recording royalties is not clear and would depend on the specifics of both changes, but “[REDACTED]” (126:2-127:3) • An explanation of how <i>his own Nash model submitted in this proceeding</i> predicts that the relative bargaining power (μ) of the labels and services will determine how much the labels and services “give up” if surplus was reduced because the musical works rate was raised, with the labels giving up nothing if they had zero bargaining power, and the services giving up nothing if they had zero bargaining power. (135:15-141:2) <p>All of these points, and the others in this excerpt, contradict the Services’ insinuation in the citation to the allowed excerpt that Prof. Katz’s testimony, as a whole, speaks to a rejection of the Nash model or the dynamics of the relationship between sound recording and musical work royalty rates. Instead, as this excerpt shows, Prof. Katz’s own Nash model reached the same core conclusions that Prof. Watt reached and which underlie the Board’s reasoning in the Final Determination.</p>
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IV. Pages 42 Citation to the Katz Deposition Transcript (see Order at 16, ¶ 2(b))

A. Excerpt allowed into the record

Page 42 of the Services’ Reply Brief cites to pages 141:18-143:2 of the Katz Deposition Transcript. The citation ends in the middle of a witness answer that continues uninterrupted for another nine lines. The excerpt, with the additional language at the end of the excerpted answer underlined, reads:

Q. So would you expect to see a reduction in sound recording royalties if the musical works rate was raised?

A. So as –

MR. LARSON: Just a minute. Object. Are you talking in the model or in the real world?

MR. SEMEL: In the real world.

A.

[REDACTED]

[REDACTED]

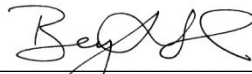
B. Additional excerpt counter-designated

Citation	Link to excerpt allowed into the record
58:20-64:2	<p>This excerpt from earlier in the deposition addresses the portion of the allowed excerpt concerning whether the effects of the original Final Determination may have been delayed due the appeal and appellate decision. The context for this discussion was Prof. Katz's thoughts concerning potential disruption from the rates and terms. Prof. Katz testified:</p> <ul style="list-style-type: none"> • If a rate change never affected the Services' behavior, "[REDACTED]" (58:18-59:4) • "[REDACTED]" (62:10-15) • While speculating about what the effects on behavior would be of services expecting a more favorable outcome on appeal, he

	<p>had no recollection of discussing with anyone at Pandora “[REDACTED] [REDACTED].” (63:4-64:2)</p> <p>This excerpt shows that Prof. Katz did not undertake any empirical analysis into whether there was any support for the speculation that the appeal of the Final Determination materially affected the market, but rather he had not seen any evidence that there was a change in service behavior at any time before or after the appeal filing or decision.</p>
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Dated: December 1, 2021

PRYOR CASHMAN LLP



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EXHIBIT A
RESTRICTED
FILED UNDER SEAL

Before the
UNITED STATES
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

DETERMINATION OF ROYALTY RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(PHONORECORDS III)

Docket No. 16–CRB–0003–PR (2018–2022)
(Remand)

**DECLARATION OF BENJAMIN K. SEMEL
REGARDING RESTRICTED INFORMATION**

1. I am a partner at Pryor Cashman LLP, counsel for the National Music Publishers’ Association (“NMPA”) and the Nashville Songwriters Association International (“NSAI” and, together with the NMPA, the “Copyright Owners”) in the above-captioned proceeding (the “Proceeding”).

2. Pursuant to Section IV.A of the Protective Order issued in the above-captioned Proceeding on July 28, 2016 (the “Protective Order”), I submit this declaration in connection with the Copyright Owners’ Supplemental Submission Identifying Additional Designations of the Remand Deposition Transcripts of Professors Katz and Marx (the “Supplemental Submission”).

3. I have reviewed Copyright Owners’ Supplemental Submission. I am also familiar with the definitions and terms set forth in the Protective Order. Each of the redactions that the Copyright Owners have made to the publicly-filed version of the Supplemental Submission is necessitated by the designation of that information as “Confidential Information” under the Protective Order by either one of the participants in this proceeding. Because the Copyright Owners are bound under the Protective Order to treat as “Restricted” and to redact information designated “Confidential Information” by participants, they are doing so. Copyright Owners

reserve all rights and arguments as to whether any such information is, in fact, “Confidential Information.”

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: December 1, 2021
New York, New York

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Counsel for Copyright Owners

Proof of Delivery

I hereby certify that on Wednesday, December 01, 2021, I provided a true and correct copy of the Copyright Owners' Supplemental Submission Identifying Additional Designations of the Remand Deposition Transcripts of Professors Katz and Marx to the following:

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Amazon.com Services LLC, represented by Scott Angstreich, served via ESERVICE at sangstreich@kellogghansen.com

Google LLC, represented by David P Mattern, served via ESERVICE at dmattern@kslaw.com

Nashville Songwriters Association International, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Spotify USA Inc., represented by Richard M Assmus, served via ESERVICE at rassmus@mayerbrown.com

Signed: /s/ Benjamin K Semel